(1) Supreme Court, U.S.
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In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., PETITIONER

v.

BRUCE S. SPERLING, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

State trial courts in Texas have virtually unconstrained discretion to grant new trials in civil cases. When a new trial is ordered, the trial court is not required to offer any explanation for its decision, and the decision is not subject to appellate review at any point, either by appeal or by mandamus. In these respects, the Texas system denies litigants procedural safeguards that are provided in the federal courts and in the courts of every other State, where a trial court's decision to grant a new trial may be challenged on appeal.

The question in this case is whether the Texas system, which grants the trial court complete and unreviewable discretion to award a new trial, comports with the requirements of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to Bruce Sperling, the respondents are Elizabeth Sperling, Harvey Barnett (as administrator of the estate of Haley Sperling), Andrew Ramirez, Ester Ramirez, Andrew Ramirez, Jr. (as Next Friend of Jacquelyn Renee Guerra, A Minor, and as Administrator of the Estate of Diana Alice Ramirez-Guerra, Deceased), and Rudy Garza.

The immediate parent corporation of petitioner Volkswagen of America, Inc., is Volkswagen Beteiligungsgesellschaft mbH, which in turn is wholly owned by Volkswagen AG. Petitioner has the following non-wholly owned subsidiary: Heritage Motors, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Volkswagen of America, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The orders of the Texas Supreme Court (App., *infra*, 1A-2A), the Texas Court of Appeals (*id.* at 3A), and the Texas District Court (*id.* at 4A-11A) are unreported.

JURISDICTION

The judgment of the Texas Supreme Court was entered on May 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Although the decision below contemplates further state-court proceedings relating to the plaintiffs' claims, the judgment is final within the meaning of 28 U.S.C. § 1257 for two independent reasons. *First*, the decision below "conclusively disposes of a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy." R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 96 (7th ed. 1993). That decision dispositively establishes the view of the highest state court in Texas that the Texas regime for the award of new trials is constitutional, which is "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963). See, *e.g.*, *Burlington Northern R.R.* v. *Ford*, 504 U.S. 648, 650 & n.* (1992); *Construction Laborers* v. *Curry*, 371 U.S. 542, 548-552 (1963).

Second, the decision below disposes of a mandamus proceeding, and for purposes of Section 1257 applications for writs of mandamus or prohibition are "independent proceedings, even though they relate to a pending lawsuit." R.

Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 108. As a consequence, an application for mandamus or prohibition "is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code." *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916). See, *e.g.*, *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285 (1943); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

Texas accords its state trial judges plenary authority to order new trials in civil cases, without explanation and for virtually any reason. When a Texas trial court does order a new trial, that decision is wholly unreviewable; it may not be challenged either by appeal or by mandamus, either immediately or after the retrial. This regime differs from the procedures followed in *every* other state and in the federal courts, where new trial orders may be tested on appeal. The Texas system also works a dramatic and troubling departure from the common law tradition, which at the time of the adoption of the Fourteenth Amendment generally permitted appellate review of new trial decisions. And the Texas procedure inevitably leads to capricious results, which most often will work to the disadvantage of unpopular or foreign litigants. In these circumstances, review by this Court of this challenge to the unique Texas new trial regime is appropriate.

1. The State of Texas gives its trial judges extraordinarily broad discretion to grant new trials to losing litigants. In addition to familiar grounds such as evidentiary insufficiency

(see Tex. R. Civ. P. 326) and jury misconduct (see Tex. R. Civ. P. 327), a Texas trial court may set aside the jury's verdict and grant a new trial — either on the motion of a party or on the court's own motion — whenever the judge deems that course to be "for good cause." Tex. R. Civ. P. 320. Under this regime, "the trial court has plenary authority until thirty days after the [entry of judgment] to grant a new trial * * * . While the court thus retains control over the judgment its power to change or vacate it is complete, and new trials may be granted in the interest of justice, not for errors of law only." *American Motorists Ins. Co.* v. *Sells*, 747 S.W.2d 27, 28 (Tex. App. 1988).

Texas courts accordingly have emphasized that "[t]he rules expressly grant plenary, *which means absolute*, power to the judge. Moreover, the judge's decision in this respect must many times be intuitive and based on subjective factors concerning the fairness of the trial which will be difficult or impossible to articulate." *Sells*, 747 S.W.2d at 29 (emphasis added). See, *e.g.*, *Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (emphasizing that "[t]rial courts have always had broad discretion in the granting of new trials"); *Kvanvig* v. *Garcia*, 928 S.W.2d 777, 778 (Tex. App. 1996) (same).[1] A judge who enters a new trial "in the interest of justice" is under no obligation to offer any explanation for the decision; Texas law does not contain an equivalent to Fed. R. Civ. P. 59(d), which requires a federal district court to

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[1] Although the Texas courts have recognized standards that constrain the judge's discretion when it comes to *denying* motions for a new trial, these standards "have never been applied to limit the trial court's power to *grant* a new trial within the period of the court's plenary power over its judgments." *Burroughs* v. *Leslie*, 620 S.W.2d 643, 644 (Tex. App. 1981) (emphasis added). See *Sells*, 747 S.W.2d at 28 ("Greater latitude is allowed in granting new trials than in refusing them * * * .").

"specify the grounds in its order" when it grants a new trial on its own initiative.

Once a Texas trial court grants a new trial, its decision to do so is not subject to review, either immediately or after the retrial. Texas courts have held repeatedly that an order "granting the motion for new trial is not reviewable on appeal. * * * 'An order granting a new trial * * * is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court.'" *Cummins* v. *Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984) (per curiam) (quoting *Burroughs* v. *Leslie*, 620 S.W.2d 643, 644 (Tex. Civ. App. 1991)). See, *e.g.*, *City of Dallas* v. *Ormsby*, 904 S.W.2d 707, 711 (Tex. App. 1995) ("the granting of a new trial within the trial court's period of plenary power is not subject to review either by a direct appeal from the order or from a final judgment rendered after further proceedings in the trial court"); *Gee* v. *Lewisville Mem. Hosp., Inc.*, 849 S.W.2d 458, 461 (Tex. App. 1993) ("An order granting a new trial is not subject to review, either by direct appeal from the order or from a final judgment rendered after later proceedings."); *Sells*, 747 S.W.2d at 28 ("the action of the trial court in granting a new trial is not reviewable, even in an appeal from the judgment in a second trial").[2]

Orders granting new trials also are not subject to review by mandamus. Again, the Texas courts have held repeatedly that

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[2] The Texas Legislature did provide for interlocutory appeal of new trial orders in 1925, but repealed the provision two years later. See Act of Feb. 23, 1925, 39th Leg., R.S., ch. 18, A, 1925 Tex. Gen. Laws 45, codified as Tex. Rev. Civ. Stat. Ann. art. 2249 (Vernon 1925); Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, 1, 1927 Tex. Gen. Laws 75. In 1987, Texas created a right to appeal new trial orders in criminal, but not civil, cases. Act of May 30, 1987, 70th Leg., R.S. ch. 382, 1, 1987 Tex. Gen. Laws 1994, amending Tex. Code Crim. Proc. art. 44.01.

> [i]t is the general rule, well established, that an appellate court will not review by mandamus an action of the trial court granting a new trial while it still has jurisdiction of the cause. The discretion and judgment of the trial court in granting a new trial cannot be controlled or directed by mandamus.

Johnson v. *Court of Civil Appeals for Seventh Supreme Judicial Dist.*, 350 S.W.2d 330, 331 (Tex. 1961). See, *e.g.*, *Johnson*, 700 S.W.2d at 917; *Kvanvig*, 928 S.W.2d at 778.[3] As a consequence, decisions awarding new trials in Texas — however insupportable or unreasoned — are committed by state law to the unreviewable discretion of state trial judges.

2. This case arose out of a serious traffic accident that occurred in Hidalgo, Texas. Haley Sperling, driving a Volkswagen Passat automobile manufactured by petitioner, was passing a car driven by Rudy Garza when the vehicles bumped twice; Sperling's car swerved into the opposing traffic

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[3] The Texas courts have identified only two narrow circumstances in which mandamus relief may be available:

> There are only two instances where any appellate court of this state has ever directed the trial judge to set aside its order granting motion for new trial. These instances are: (1) When the trial court's order was wholly void as where it was not entered in the term in which the trial was had; and (2) Where the trial court has granted a new trial specifying in the written order the sole ground that the jury's answers to special issues were conflicting.

Johnson v. *Court of Civil Appeals*, 350 S.W.2d at 331. See *Johnson*, 700 S.W.2d at 917; *Kvanvig*, 928 S.W.2d at 778 ("mandamus relief is generally not available to vacate an order granting a new trial, with the following two exceptions: (1) where the trial court rules after its jurisdiction expires; and (2) where a new trial is granted because of a perceived conflict in the jury verdict"). Neither of these narrow exceptions to the general rule of nonreviewability has any bearing in this case.

lanes, colliding head-on with a vehicle driven by Diana Guerra. Sperling and Guerra died in the accident, and Guerra's daughter, a passenger in her mother's car, suffered serious injuries. See App., *infra*, 1A. The Sperling and Guerra families, respondents in this Court, then sued petitioner, claiming that the accident was caused by the failure of the left rear wheel of Sperling's Passat.[4] Petitioner denied liability, maintaining that the wheel did not fail but was damaged in the accident. *Ibid.* After a four week trial, the jury unanimously answered "no" to all liability questions, rejecting respondents' assertion that the accident was caused by petitioner. See *id.* at 1A-2A. The trial court accordingly entered judgment on the verdict that respondents recover nothing. *Id.* at 8A-10A.

Respondents subsequently filed a motion for a new trial, contending that the jury's verdict was against the great weight and preponderance of the evidence. See App., *infra*, 2A. Petitioner replied that respondents' new trial argument was defective as a matter of law because, although respondents contended that the evidence did not establish petitioner's theory of the accident, respondents made no attempt to show that the jury had to accept respondents' assertion that the wheel was defective. The trial court nevertheless granted the motion without explanation, stating simply that, "after considering such motions [for new trial], the responses thereto, the arguments of counsel, and all of the evidence admitted at trial, the Court is of the opinion that a new trial should be granted in the interest of justice." *Id.* at 4A. See *id.* at 5A (judgment is set aside and new trial granted "in the interest of justice"). The court later denied petitioner's request for rehearing without opinion or explanation. *Id.* at 6A. The Texas Court

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[4] Those plaintiffs are now aligned with Mr. Garza as respondents in this Court.

of Appeals, in turn, denied without opinion petitioner's request for mandamus. *Id.* at 3A.

Petitioner then sought mandamus in the Texas Supreme Court, contending that respondents' new trial arguments were defective as a matter of law and arguing that federal due process principles required that the new trial order be subject to review. See Mandamus Pet. 12-13. Respondents opposed mandamus relief by arguing, among other things, that orders granting new trials are not subject to appellate review in Texas by appeal or mandamus. Resp. Tex. Sup. Ct. Br. 11. See *id.* at 13 (referring to Texas Supreme Court's "unbroken line of * * * decisions" denying review of new trial orders). The court denied the mandamus petition without opinion. App., *infa*, 1A.

Justice Hecht, joined by Justice Owen, dissented from the denial. Noting that the trial court had granted the new trial "'in the interest of justice' without explanation" (App., *infra*, 1A), Justice Hecht explained:

> [W]hile trial courts should have broad discretion to grant a new trial in the interest of justice, that discretion should not be insulated from all review, and trial courts should be required to state reasons for their rulings. It is never too much, in my view, to require a court to state a reasoned basis for its ruling. To refuse to render judgment on a verdict without stating a reason is not in the interest of justice, but in the interest of injustice.

Id. at 2A.

In expressing this opinion, Justice Hecht referred to the views he and Justice Owen had expressed some months earlier when dissenting from another decision of the Texas Supreme Court denying mandamus relief in a virtually identical case involving the grant of a new trial against a different out-of-state auto manufacturer. *In re Bayerische Motoren Werke, AG,*

8 S.W.3d 326 (Tex. 2000) ("*BMW*") (reprinted at App., *infra*, 12A-23A). In his *BMW* dissent, Justice Hecht noted that the Texas Supreme Court "answers no" to the question: "Is there any limit to, and any review of, a trial court's power to grant a new trial on its own initiative?" *Id.* at 12A. Maintaining that mandamus relief should be available when a trial court's new trial order was the product of "error, whim, and bias" (*id.* at 14A), Justice Hecht concluded that "I know of no reason why a trial court's exercise of discretion in granting a new trial should ever be insulated from all review." *Id.* at 15A. He added that

> a reasoned explanation for a [trial] court's ruling does not curb either the sound exercise of discretion or the cause of justice; rather, it helps guarantee both. There are many reasons why a trial court may grant a new trial. The expectation that at least one reason should be given is not exorbitant. The refusal to give even one is dangerously peremptory.

Id. at 16A.

REASONS FOR GRANTING THE PETITION

The Texas system for the award of new trials makes use of several elements that, in combination, invite arbitrary deprivations of property. Texas trial judges have unconstrained discretion to order new trials for any reason, a discretion that they may exercise without explanation or review. Because this procedural regime presents a substantial possibility of error, *it has been rejected by every other American jurisdiction*, each of which permits new trial orders to be challenged on appeal. By the same token, Texas's scheme denies litigants protections that are deeply rooted in American legal tradition. And the Texas system is worse than an aberrational curiosity: as this Court has recognized on several occasions, the sort of unfettered and unreviewable discretion delegated to Texas trial judges inevitably causes lawless, capricious, or biased results.

The dangers inherent in such a system are manifest. Whatever their virtues, judges occasionally err, and they are not wholly immune from bias against particular kinds of litigants. Yet the Texas scheme plays to the worst impulses of judicial decisionmakers, allowing judges, for any reason and without the threat of an appeal, to punish disfavored parties by forcing them to litigate the same issues repeatedly. At a minimum, judges exercising this power may strip litigants of judgments they fairly won (and to which they are entitled), forcing them to repeat lengthy and expensive trials; at worst, it may leave parties with no choice but to settle cases in which they deserve the entry of judgment in their favor. This is a very real prospect, because there is no limit on the number of new trials that may be granted in a single case. See *Wright* v. *Swayne*, 140 S.W. 221 (Tex. 1911) (Texas appellate courts have no authority to review grant of *third* new trial against defendant).[5]

A regime that offers no safeguard against this sort of capricious outcome cannot be squared with the Due Process Clause's "fundamental guarantee * * * that the individual citizen may rest secure against arbitrary or irrational deprivations of property." *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 467 (1993) (opinion of Kennedy, J.). Because this system denies Texas litigants an essential protection that is guaranteed by the U.S. Constitution and is enjoyed by litigants in every other State — and because, as in this case, the errors caused by the denial of this

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[5] Texas law permits a judge to grant only two new trials on grounds of evidentiary insufficiency (see Tex. R. Civ. P. 326), but there is no limit on the number of new trials that may be ordered on other (or unspecified) grounds. A hostile judge therefore may make it impossible for a disfavored litigant ever to obtain the benefit of a favorable verdict.

protection most often will be felt by out-of-state or foreign citizens — review by this Court is imperative.

A. Texas's Refusal To Permit Appellate Review Of New Trial Orders Departs From The Historical Practice And Is An Aberrant Rule That Is Inconsistent With The Uniform Approach Of All Other American Jurisdictions

This Court has "relied on history and 'widely shared practice' as a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process." *TXO*, 509 U.S. at 457 (citation omitted). See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 421 (1994); *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) (plurality opinion); *Burnham* v. *Superior Court*, 495 U.S. 604, 615 (1990) (opinion of Scalia, J.). Here, that guide points unequivocally towards the unconstitutionality of the Texas system: the practice of providing appellate review of new trial orders is deeply ingrained and — outside of Texas — universally recognized in American law.

So far as "current practice" (*Schad*, 501 U.S. at 640 (plurality opinion)) is concerned, the United States, the District of Columbia, and *every* State other than Texas provides for appellate review of new trial orders.[6] Twenty-six States permit an immediate appeal when a new trial is granted;[7] the United States, the District of Columbia, and the remaining States provide for appellate review of the new trial order after the

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[6] The authorities supporting review in these jurisdictions are set out in Appendix E, *infra*, 24A-27A.

[7] These States and supporting authorities are listed in Appendix F, *infra*, 28A-29A.

retrial.[8] This uniform approach is highly significant because, as the Court has indicated on several occasions, the constitutionality of a state practice must be regarded as doubtful when it is inconsistent with the approach taken "[i]n the federal courts and in every [other] State." *Honda*, 512 U.S. at 426. See *Burnham*, 495 U.S. at 615 (opinion of Scalia, J.). As a consequence, Texas's "unique position" makes its new-trial regime constitutionally suspect. *Honda*, 512 U.S. at 427.

In addition, Texas's denial of the right to appellate review in this setting works a striking "departure from traditional procedures." *Honda*, 512 U.S. at 421. At the time of the adoption of the Fourteenth Amendment,[9] an overwhelming majority of the States permitted some type of appellate review of trial court orders granting new trials. Twenty-five States and the District of Columbia permitted review by appeal in at least some circumstances,[10] while another six States allowed

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[8] These jurisdictions and supporting authorities are set out in Appendix G, *infra*, 30A-32A.

[9] "[B]ecause this case concerns the Due Process Clause of the Fourteenth Amendment, 19th century American practice is the 'crucial time for present purposes.'" *Honda*, 512 U.S. at 434 n.12 (quoting *Burnham*, 495 U.S. at 611 (opinion of Scalia, J.)).

[10] See *Willamouicz* v. *Strong*, 8 Ark. 467, 1848 WL 716 (Ark. 1848); *Trowbridge & Jennings* v. *Sanger*, 4 Ark. 179, 1842 WL 370 (Ark. 1842); *Porter* v. *Doe*, 10 Ark. 186, 1849 WL 595 (1849); *Payne* v. *Pacific Mail S.S. Co.*, 1 Cal. 33, 37, 1850 WL 583 (Cal. 1850); *Wallace* v. *Middlebrook*, 28 Conn. 464, 1859 WL 1299 (Conn. 1859); *Bringhurst* v. *Harkins*, 122 A. 783, 786 (Del. 1923); *Doddridge* v. *Gaines*, 8 D.C. 335 (D.C. 1874); An Act to reorganize the courts in the District of Columbia, and for other purposes, March 3, 1863, § 8; *Schultz* v. *Pacific Ins. Co.*, 14 Fla. 73, 1872 WL 2150, at *3 (Fla. 1872); *Dawkins* v. *Carroll*, 5 Fla. 407, 1854 WL 1271 (Fla. 1854); *J.M. Nunez & Co.* v. *Southern Express. Co.*, 45 Ga. 314, 1872 WL 2578, at *2 (Ga. 1872); *Cook* v. *Otto*, 13 Ind. 380, 1859 WL 5006

the use of mandamus to challenge new trial orders.[11] In contrast, only five States (including Texas) appear to have

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(Ind. 1859); *Chapman* v. *Wilkinson*, 22 Iowa 541, 1867 WL 232 (Iowa 1867); *Shepherd* v. *Brenton*, 15 Iowa 84, 1863 WL 99 (Iowa 1863); *Field* v. *Kinnear*, 5 Kan. 233, 1869 WL 428, at *3 (Kan. 1869); *Backus* v. *Clark*, 1 Kan. 303, 1863 WL 291, at *4-6 (Kan. 1863); *Hutcheson* v. *Plummer*, 2 Ky. 322, 1804 WL 606, at *1 (Ky. 1804); *McCall* v. *Hitchcock*, 72 Ky. 66, 1872 WL 6809 (Ky. 1872); *Gottheil* v. *Fisk*, 3 Rob. (La.) 434, 1843 WL 1274, at *1 (La. 1843); La. Code of Practice, Art. 566 (Fuqua 1867); *Davenport* v. *Holland*, 56 Mass. 1, 11, 1848 WL 4280, at *7 (Mass. 1848) (appeal when erroneous application of law by trial judge); *Munde* v. *Lambie*, 125 Mass. 367, 368, 1878 WL 10967, at *1 (Mass. 1878) (same); *Hicks* v. *Stone*, 13 Minn. 434, 1868 WL 1919 (Minn. 1868); *Bank of Lexington* v. *Taylor*, 10 Miss. 27, 1843 WL 3248 (Miss. Err. & App. 1843); *Terry* v. *Robins*, 13 Miss. 291, 1845 WL 2016 (Miss. Err. & App. 1845); *Missouri Pac. Ry.* v. *Hays*, 18 N.W. 51, 52 (Neb. 1883); *Iler* v. *Darnell*, 5 Neb. 192, 1876 WL 4490, at *1 (Neb. 1876); Nev. Rev. Stat. tit. 16, ch. 1, § 581 (Estrabrook 1866); *State* v. *Salge*, 2 Nev. 321, 1866 WL 1638 (Nev. 1866); *Clark* v. *Brooks*, 2 Abb.Pr. (N.S.) 385, 1866 WL 5291 (N.Y. Com. Pl. 1867); *Wright* v. *Hunter*, 46 N.Y. 409, 1871 WL 9815 (N.Y. 1871); N.C. Code of Civ. Proc., tit. XIII, § 313 (Barringer, Rodman, Tourgec 1868); *Beatty* v. *Hatcher*, 13 Ohio St. 115, 120-121, 1861 WL 97, at *3 (Ohio 1861); Oregon Code of Civ. Proc. §§ 573, 575 (Deady, Gibbs, Kelly 1863); *Noland* v. *Rhode Island*, 74 A. 914 (R.I. 1910); R.I. Gen. Stat. Ch. 207, §§ 2-3 (Sheffield, Payne, Hayes 1872); R.I. Rev. Stat. Ch. 164, § 4 (1857); *Byrd* v. *Small*, 2 S.C. 388, 1870 WL 7986 (S.C. 1870) (appeal limited to questions of law); *Pleasants* v. *Clements*, 29 Va. 474, 1831 WL 1898 (Va. 1831); *Tyler* v. *Taylor*, 62 Va. 700, 1872 WL 5173 (Va. 1872); *Tompkins' Ex'r* v. *Stephens*, 10 W. Va. 156, 1877 WL 3455 (W. Va. 1877); *Chamberlain* v. *Milwaukee & Miss. R.R. Co.*, 7 Wis. 425, 1877 WL 3455 (Wis. 1859).

[11] See *Ex parte Nall*, 36 Ala. 299, 1860 WL 546, at *1 (Ala. 1860); Maine Rev. Stat. Ch. 77, § 4 (Flint, Baker, Wedgewood 1871); Md. Rev. Laws Art. 58 (Scott & McCullough 1859); *Leahy* v. *Dugdale*, 41 Mo. 517, 1867 WL 4772 (Mo. 1867); Purdon's Digest (Pa.) p. 928, § 28 (Brightly 1868); Vt. Gen. Stat. tit. 15, ch. 30, § 11 (Shaw 1862).

precluded appellate review of new trial orders — and four of them, of course, have long since joined the majority in permitting appellate review.[12] Like Texas's departure from consistent modern practice, this history raises grave doubts about the constitutionality of the Texas scheme: a State's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda*, 512 U.S. at 430. See, *e.g.*, *Burnham*, 495 U.S. at 619, 622 (opinion of Scalia, J.).

Indeed, when States have departed from a traditional rule that "provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda*, 512 U.S. at 430. Here, Texas has not provided a "substitute for the protection" offered by appellate review of new trial orders. *Id.* at 431. And it cannot be suggested that elimination of that safeguard is a response to "new problems not envisioned by

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[12] See *Weaver* v. *Crocker*, 49 Ill. 461, 1869 WL 5140 (Ill. 1869) (denial of motion for new trial reviewable, but grant of motion is not); *People* v. *Judge of Wayne Cir. Ct.*, 20 Mich. 220, 1870 WL 4124, at *1 (Mich. 1870); *Black* v. *Shreve*, 13 N.J. Eq. 455, 1860 WL 5167 (N.J. Err. & App. 1860); *Huggins & Ransom* v. *Moore*, 40 Tenn. 426, 1859 WL 3498 (Tenn. 1859); *Bass* v. *Hays*, 38 Tex. 128, 1873 WL 7374 (Tex. 1873). But see *Detroit Tug & Wrecking Co.* v. *Garner*, 75 Mich. 360, 379, 42 N.W. 968, 975 (Mich. 1889) (suggesting that appeal might be available if trial judge acted "through caprice, partiality, or passion"). In one other State, New Hampshire, new trial motions were made to the Supreme Judicial Court, so the question of appeal did not arise. See N.H. Gen. Stat. tit. 23, ch. 189, § 2 (Fowler & Sawyer 1867); *Barron* v. *Jackson*, 42 N.H. 419, 1861 WL 2027 (N.H. 1861). After that system was changed, appeal of new trial orders was available. See *Cox* v. *Leviston*, 20 A. 246 (N.H. 1889).

the rules developed in another era. * * * If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards." *Ibid.* Texas accordingly "has removed a safeguard without providing any substitute procedure, and without any indication that the danger of arbitrary [orders] has in any way subsided over time." *Id.* at 432.

Against this background, the Texas system comes to this Court with a heavy presumption of unconstitutionality. Texas's combination of essentially unconstrained trial-court discretion and no appellate review is a "freakish" one that "finds no analogue in history or in the * * * law of other jurisdictions." *Schad*, 501 U.S. at 640 (plurality opinion) (footnote omitted). And given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" (*ibid.*), Texas's decision to withhold safeguards that are provided by all other American jurisdictions runs afoul of the Due Process Clause.

B. Texas's Denial Of Appellate Review Or Equivalent Safeguards Deprives Litigants Of Procedures That Are Essential To Ensure Fundamental Fairness

The relevance to due process analysis of Texas's departure from widespread and traditional practices is plain. While there is some disagreement on the Court about the proper constitutional approach when traditional procedures that had currency at the time of the ratification of the Fifth or Fourteenth Amendments are themselves attacked (compare, *e.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 17-19 (1991) (majority opinion), and 60-63 (O'Connor, J., dissenting), with *id.* at 34-38 (Scalia, J., concurring in the judgment)), there is no doubt that when a State chooses to deviate from traditionally accepted procedures, those who would defend the State's aberrant approach have a high burden:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908). See *Schad*, 501 U.S. at 650 (opinion of Scalia, J.); *Burnham*, 495 U.S. at 622 (opinion of Scalia, J.).[13]

In analyzing the constitutionality of such novel state procedures in the noncriminal context, the Court asks whether the challenged state practice makes an "'appropriate accommodation of the competing interests involved.'" *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (quoting *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975)). This inquiry requires use of the familiar three-part test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which the Court has "characterized * * * as 'a general approach for testing challenged state procedures under a due process claim.'" *Medina* v. *California*, 505 U.S. 437, 444 (1992) (quoting *Parham* v. *J.R.*, 442 U.S. 584, 599 (1979)).[14] Under this approach, the Court must

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[13] In fact, there appears to be agreement on the Court that even traditional procedures may be subject to challenge on due process grounds "when the 'perpetuation of ancient forms' is engaged in by only a very small minority of the States." *Burnham*, 495 U.S. at 622 (opinion of Scalia, J.). That would be the case here if the Texas regime had any historical support.

[14] See, *e.g.*, *Burns* v. *United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting); *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-543 (1985); *Logan*, 455 U.S. at 434.

> consider [1] the private interest affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards, and [3] the Government's interest, including the administrative burden that additional procedural requirements would impose.

United States v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). See *Mathews*, 424 U.S. at 335. Consideration of these three factors demonstrates that Texas's refusal to provide meaningful constraints on the award of new trials violates due process.

1. The Private Interest. First, the private property interest at stake in the new trial context may be very substantial. A defendant who is deprived of a judgment to which it is entitled will face a variety of serious, adverse consequences.[15] At a minimum, the defendant will "suffer the delay and the enormous expense of a retrial" that (like the initial trial in this case) may last for weeks, and at which the adverse party may offer new arguments and theories. App., *infra*, 12A. The defendant also faces renewed and unwarranted exposure to potentially significant liability that may include virtually limitless punitive damages, an exposure that itself is a real cost. A defendant who is accused of misconduct suffers reputational injury during the pendency of the allegation. Cf. *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). And outstanding liability claims, even if contingent, impair a business defendant's value. In these circumstances, the private interest in retaining a judgment to which a litigant is entitled, in freedom from having to litigate, and in "legal peace," is very large. Defendants accordingly should not be forced to

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[15] As we explain in more detail below (at 21-22), there is no doubt that a judgment is a species of property, the deprivation of which must be accompanied by due process protections.

surrender a favorable jury verdict in the absence of adequate procedural safeguards.

2. The Likelihood of Error. Turning to the second prong of the *Mathews* test, there is a substantial risk of error in a regime where a trial judge, without appellate review at any point and without even the discipline of providing an explanation, is given essentially unconstrained discretion to order a new trial. In advancing this argument, we do not contend that the Due Process Clause creates a universal right to appeal all trial court decisions; as a general matter, the "'Court has never held that the States are required to establish avenues of appellate review.'" *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 111 (1996) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966)).[16] If a State dispenses with appellate review, however, it must take steps to adequately assure "the essential fairness of the state-ordered proceedings anterior to adverse state action." 519 U.S. at 120. Cf. *id.* at 114 ("'*if a full and fair trial on the merits is provided*, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review'") (emphasis added) (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972)). Here, absent appellate review or some equivalent safeguard, the problematic aspects of the Texas system pose an unacceptable risk of error.

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[16] Nor do we contend that the Fourteenth Amendment generally establishes an entitlement to jury trial in state court. Here, however, Texas law confers a right to trial by jury. See Tex. Const. art. I, § 15; *id.* art. V, § 10; *Larson* v. *Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987). State law also provides that a litigant is entitled to judgment when it makes the requisite substantive showings to the finder of fact, which in this case was a jury. Because, as we explain below (at 21-22), that judgment is property within the meaning of the Due Process Clause, the judgment may not be set aside without adequate procedural protections.

First, state law gives Texas trial judges virtually unfettered discretion to set aside judgments and order new trials. As we have noted, in addition to grounds such as evidentiary insufficiency and trial error, a Texas trial judge may order a new trial whenever he or she believes that to be "in the interest of justice" — which means, essentially, for any undisclosed reason at all. The Texas courts have emphasized that the judge's power in this regard is "absolute" and that the decision may be premised on avowedly inarticulable considerations such as "intuiti[on]" or other "subjective factors." *Sells*, 747 S.W.2d at 29.

This unconstrained discretion and invitation to indulge subjective impulses invites error. As a general matter, the Court has explained that "due process is satisfied" when "discretion is exercised within reasonable constraints." *Haslip*, 499 U.S. at 20. In contrast, as Justice O'Connor has noted, "it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation." *TXO*, 509 U.S. at 475 (O'Connor, J., dissenting). And although Justice O'Connor was specifically referring to juries, judges — especially those who are popularly elected, as are judges in Texas — are not wholly immune from this danger; "'[d]eprived of any fixed landmarks and guideposts, any of us can be distracted, played on, and befuddled to the point where our best guess is far from reliable.'" *Ibid.* (citation omitted). Indeed, the Court has observed that not only unlimited jury discretion, but "unlimited judicial discretion" as well, "may invite extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. The unlimited discretion given trial judges under the Texas regime accordingly can be expected to result in "lawless, biased, or arbitrary" results. *Honda*, 512 U.S. at 433. See *Haslip*, 499 U.S. at 43 (O'Connor, J. dissenting) (inviting reliance "on private beliefs and personal

predilections" leads to "inconsistent and unpredictable results").

Second, the problems posed by unlimited discretion are compounded by another peculiarity of Texas law: other than reciting the formula "in the interest if justice," trial judges need provide no explanation when they grant new trials. In contrast, as Justice Hecht noted in his *BMW* dissent, the federal courts, and those of virtually all other States, require judges to articulate their reasons when granting new trials, at least in cases where the court grants the new trial on its own initiative.[17] Of course, judges do not violate the Constitution simply by failing to explain their decisions. See *TXO*, 509 U.S. at 465. But providing an explanation imposes some small measure of discipline on the decisionmaker and may tend to discourage capricious results (cf. *id.* at 497-498 (O'Connor, J., dissenting); *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 16 (1979)); even that discipline is missing in Texas.

In fact, in this regard, the Texas scheme imposes a perverse set of incentives on trial judges. If the judge articulates a plainly impermissible reason for granting a new trial — racial bias, for example — one imagines that the State's appellate courts would find some way to set the decision aside. But by not stating any reason, the judge wholly insulates his or her decisions from review. This regime "creates an unacceptable risk of error." *James Daniel Good*, 510 U.S. at 55.

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[17] See App., *infra*, 16A & nn. 20-27 (citing authorities). Only Texas and South Carolina "allow a trial court broad discretion to grant a new trial on its own initiative without stating a reason." *Id.* at 16A & nn. 21-22. (Of course, South Carolina permits appeal from the trial court's decision.) In addition, Arkansas, Nevada, and New York "do not require the trial court to state its reasons but restrict its discretion," while Connecticut and Virginia "do not permit a trial court to grant a new trial on its own initiative at all." *Id.* at 16A & nn. 23-27.

3. The State's Interest. Finally, the State's interest in preserving the existing scheme is insubstantial because permitting appellate review of new trial orders "would impose neither a significant administrative burden nor intolerable delays." *Loudermill*, 470 U.S. at 544. Texas already provides for appellate review of virtually all other trial court orders,[18] which suggests that such a procedure is not especially burdensome. Indeed, the fact that *no* other State denies such review is a powerful indication that the costs of permitting an appeal are not particularly heavy; there cannot be a substantial state interest in denying review when "[m]any States, as well as the Federal Government," make appellate review available, "and they have not found the * * * burden so great as to preclude" providing the safeguard. *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985). See *Santosky* v. *Kramer*, 455 U.S. 745, 767 (1982) (noting that 35 States provide requested safeguard). Providing review therefore "would reduce factual error without imposing substantial fiscal burdens upon the State." *Ibid.*

That conclusion is dispositive, because "it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of" appellate review.

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[18] For example, appellate review is available if the trial court *denies* a new trial motion (see *Strackbein* v. *Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984)), or if the trial court grants judgment n.o.v. or orders a remittitur. See *Spencer* v. *Eagle Star Ins. Co.*, 876 S.W.2d 154, 157-158 (Tex. 1984); *Fort Bend County Drainage Dist.* v. *Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). In addition, mandamus is available to review the trial court's exercise of discretion in many areas of pretrial procedure. See, *e.g.*, *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942-943 (Tex. 1998) (discovery orders); *TransAmerican Natural Gas Corp.* v. *Powell*, 811 S.W.2d 913, 918-919 (Tex. 1991) (sanctions); *In re Foremost Ins. Co.*, 966 S.W.2d 770, 772 (Tex. App. 1998) (severance); *NCNB Texas Nat'l Bank* v. *Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (attorney disqualification).

Ake, 470 U.S. at 79. To the extent that the State is concerned about delaying retrials, it could permit review through mandamus or through an expedited process that places a substantial burden on the petitioner, or it could require that the appeal be pursued after the retrial, as in the federal courts. But in rejecting all of these alternatives, Texas has achieved purported economy through the simple expedient of declining to correct erroneous deprivations of property ordered by judges. As has been noted in a related setting, this means of achieving efficiency "is the very essence of arbitrary state action." *Logan*, 455 U.S. at 442 (opinion of Blackmun, J.).

Moreover, any state concern with economy must "necessarily [be] tempered by [the State's] interest in * * * fair and accurate adjudication." *Ake*, 470 U.S. at 79. Cf. *Loudermill*, 470 U.S. at 544 (noting State's interest in not causing wrongful deprivations of property). And a failure to correct erroneous decisions also imposes other societal costs. The wrongful award of new trials, for example, itself adds to the burdens and expense of litigation, while placing unwarranted settlement pressures on wrongfully accused litigants. The failure to provide appellate review therefore cannot be justified on utilitarian grounds.

Each of the *Mathews* factors thus militates in favor of providing appellate review or some equivalent safeguard. The private interest is substantial. The likelihood of error is large, as is the corrective value of appellate oversight. And Texas's interest in maintaining its current system is minimal. As the Court put it in very similar circumstances, "[t]he common-law practice, the procedures applied by every other State, * * * and elementary considerations of justice all support the conclusion that [the new trial] decision should not be committed to the unreviewable discretion of a [trial judge]." *Honda*, 512 U.S. at 435. In these circumstances, the State's existing approach should not stand.

C. The Texas Courts' Approach Is Based On A Plain Misunderstanding Of The Due Process Clause

Although the court below did not elaborate on the Texas courts' justification for denying appellate review of new trial decisions, those courts have offered a rationale for Texas's "'lonely eminence' in this regard." *Honda*, 512 U.S. at 427 (citation omitted). In the view of the Texas courts, due process protections are simply inapplicable in this setting. As those courts have explained, "[s]o long as a judgment is subject to this power of the trial court [to order a new trial], it establishes no vested right which is subject to protection under due process." *Burroughs*, 620 S.W.2d at 644.[19] The Texas courts thus believe that the trial judge's plenary entitlement to order a new trial for any reason makes it unnecessary for the State to provide procedural protections to litigants who are defending their judgments against new trial requests. This reasoning, however, is grounded on a fundamental misunderstanding of due process principles.

At the outset, there can be no doubt that judgments ordinarily are a kind of property that is subject to the protections of the Due Process Clause: "A judgment is property, so taking it away requires due process of law." *Kingvision Pay-Per-View Ltd.* v. *Lake Alice Bar*, 168 F.3d 347, 352 (9th Cir. 1999). There is nothing novel in that conclusion. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429. And as a general matter, "[t]he hallmark of property * * * is an individual entitlement grounded in state

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[19] The *Burroughs* court's holding on the plenary power of trial courts to order new trials has been cited as authoritative by the Texas Supreme Court. See *Cummins*, 682 S.W.2d at 236 (quoting *Burroughs*, 620 S.W.2d at 644).

law." *Id.* at 430. Here, Texas law establishes the substantive and evidentiary requirements that must be satisfied by litigants who are asserting or resisting a claim; a defendant who makes the requisite showing (or who establishes that the plaintiff failed to make its requisite showing) is entitled to a verdict, which is entered as a final judgment more or less automatically. See Tex. R. Civ. P. 301, 306a. For reasons explained above (at 15-16), such a judgment is a valuable asset, the deprivation of which must be accompanied by procedural protections. Surely, for example, it would deny due process for a judge to decide whether to grant a new trial by flipping a coin, or by throwing darts — and that conclusion necessarily rests on the premise that a judgment is property that is entitled to constitutional protection.

In reaching their contrary conclusion, the Texas courts have reasoned that judgments are divested of due process protections because state law gives trial judges "plenary power" to set judgments aside and grant new trials. *Burroughs*, 620 S.W.2d at 644. But this analysis — that judgments are not entitled to due process protections precisely *because* Texas procedural rules give trial courts unreviewable power to overturn them — commits the discredited "bitter with the sweet" error that repeatedly has been condemned by this Court. It has long been "settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee" because "[t]he categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology." *Loudermill*, 470 U.S. at 541.

> Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: [w]hile the legislature may elect not to confer a property interest, * * * it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. * * * [T]he adequacy of

> statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

Logan, 455 U.S. at 432 (citations and internal quotation marks omitted; ellipses added by the Court). The Texas approach, which is premised on the view that a standardless procedural rule trumps a substantive property interest, cannot survive application of the controlling constitutional principle.

D. The Issue Here Is Of Substantial Practical Importance

Although Texas is the only State that grants trial judges wholly unreviewable discretion to award new trials, this procedural defect in its system nonetheless is extraordinarily significant. Needless to say, Texas courts handle a huge volume of litigation in which very substantial damages awards may be returned. And litigants in Texas are being denied an important procedural safeguard that is guaranteed by the U.S. Constitution. The result inevitably will be repeated examples of what Justice Hecht described as "injustice." App., *infra*, 2A. After all, what the Court said of punitive damages is equally true in this setting: rules that give judicial decisionmakers excessive and unconstrained discretion "pose an acute danger of arbitrary deprivation of property." *Honda*, 512 U.S. at 432.

In addition, the need for this Court's attention is particularly acute because unfair application of the rules inevitably will be felt most often by unpopular litigants, particularly out-of-state or foreign corporations or other large institutions. Judicial decisionmakers are not wholly immune from "prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 509 U.S. at 464. Indeed, although Texas does not keep comprehensive statistics regarding the award of new trials, in the limited universe of lawsuits involving automobile accidents we are aware of three cases in recent years in which Texas

judges have thrown out product liability verdicts in favor of foreign automakers and granted unexplained new trials. In addition to this case and *BMW*, see *Toyota Motor Co.* v. *Wood*, No. 01-92-00284-CV, 1992 WL 49904 (Tex. App. March 12, 1992). There is every reason to believe that those cases are symptomatic of a much more far-reaching problem.

Of course, there is no conflict in the lower courts on the issue presented here — and there never will be such a conflict, because Texas is the *only* State to use its aberrational rule. But that surely cannot insulate the Texas regime from review in this Court: that Texas has adopted a procedural scheme so unfair that it has not been emulated by other States cuts in favor of, rather than against, certiorari in this case. That much is made clear by *Honda*, where, in circumstances strikingly similar to those here, the Court granted review to consider the constitutionality of a unique Oregon rule that precluded judicial consideration of the amount of damages awards returned by juries. Emphasizing Oregon's "departure from traditional procedures" (512 U.S. at 421) and the fact that Oregon's approach also was inconsistent with "[m]odern practice" in other States (*id.* at 426), the Court held the Oregon rule insupportable because it denied litigants "one of the few procedural safeguards" available in that setting against the "arbitrary deprivation of property." *Id.* at 432. Precisely the same thing is true in this case. The Texas courts are denying litigants rights that are assured by the federal Constitution, and that error warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2000

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 00-0025
In re Volkswagen of America, Inc., Relator

On Petition for Writ of Mandamus

[May 11, 2000]

Petition for writ of mandamus denied.

Justice Hecht, joined by Justice Owen, dissenting from the denial of the petition for mandamus.

The trial in this case, like the trial in *In re Bayerische Motoren Werke, AG*, [1] took three weeks. Juries in both cases found in favor of the defendant. The trial courts in both cases granted new trials "in the interest of justice" without explanation. For the same reasons I explained in BMW, I dissent from the denial of relator's petition for mandamus that would require an explanation from the trial court justifying a new trial.

Haley Sperling, driving a Volkswagen Passat, was passing a vehicle driven by Rudy Garza, when the vehicles bumped twice and Sperling's vehicle swerved into opposing traffic lanes, colliding head-on with a vehicle driven by Diana Guerra. Sperling and Guerra were both killed, and Guerra's daughter, a passenger in her car, was seriously injured. The Sperling and Guerra families sued Volkswagen of America, Inc., Garza, and others, and either settled or dismissed their claims against all defendants except Volkswagen and Garza before trial. Plaintiffs claimed that the accident was caused by the failure of the left rear wheel on Sperling's vehicle.

Volkswagen claimed that the wheel did not fail but was damaged in the accident. The jury failed to find that the Volkswagen vehicle was defective or that the accident was caused by Volkswagen, Sperling, or Garza. The trial court rendered judgment on the verdict that plaintiffs take nothing. Plaintiffs moved for a new trial on the ground that the verdict was against the great weight and preponderance of the evidence. The trial court granted plaintiffs' motions, stating in its order that "the Court is of the opinion that a new trial should be granted in the interest of justice." The trial court gave no other explanation for its ruling.

I continue to believe, as I explained at length in *BMW*, that while trial courts should have broad discretion to grant a new trial in the interest of justice, that discretion should not be insulated from all review, and trial courts should be required to state reasons for their rulings. It is never too much, in my view, to require a court to state a reasoned basis for its ruling. To refuse to render judgment on a verdict without stating a reason is not in the interest of justice, but in the interest of injustice.

Nathan L. Hecht
Justice

Opinion delivered: May 11, 2000

1. ___ S.W.3d ___ (Tex. 2000) (Hecht, J., dissenting from the denial of the petition for mandamus).

APPENDIX B

Official Notice
Court of Appeals
13th Judicial District

[Dec. 20. 1999]

Re: Case No. 13-99-00808-CV
Style: In Re: Volkswagen of America, Inc.

The relator's petition for writ of mandamus and appendices to petition for writ of mandamus were received and filed on this date. The $75.00 filing fee was also received on this date.

The petition for writ of mandamus was this date DENIED by Justices Dorsey, Chavez, and Rodriguez. Justice Rodriguez not participating.

T.C. Case # C-4118-97-B CATHY WILBORN, CLERK

APPENDIX C

CAUSE NO. C-4118-97-B

Bruce S. SPERLING, Elizabeth SPERLING, and Harvey J. BARNETT, as Independent Administrator of THE ESTATE OF HALEY H. SPERLING, deceased,

plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., and Rudy GARZA,

defendants,

v.

Andrew RAMIREZ, Jr., as Next Friend of Jacquelyn Renee GUERRA, a minor, and as Administrator of THE ESTATE OF DIANA ALICE RAMIREZ-GUERRA, deceased,

plaintiff-intervenors.

93rd JUDICIAL DISTRICT COURT
HIDALGO COUNTY, TEXAS

ORDER GRANTING NEW TRIAL

Having come on for hearing on September 29, 1999, the motions for new trial of plaintiffs Bruce SPERLING, *et al.*, and plaintiff-intervenors, Andrew RAMIREZ, Jr., *et al.*, and, after considering such motions, the responses thereto, the arguments of counsel, and all of the evidence admitted at trial,

the Court is of the opinion that a new trial should be granted in the interest of justice.

IT THEREFORE IS ORDERED that the take-nothing judgment signed in this cause on August 20, 1999, is SET ASIDE and that a new trial is GRANTED in the interest of justice.

SIGNED on October 29, 1999.

/S/

Fernando Mancias
PRESIDING JUDGE

CAUSE NO. C-4118-97-B

BRUCE S. SPERLING, ET AL

V.

VOLKSWAGENWERK
AKTIENGESELLSCHAFT, ET AL

IN THE DISTRICT COURT OF
HIDALGO, TEXAS
93RD JUDICIAL DISTRICT

ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION OF
ORDER GRANTING NEW TRIAL

ON THIS DAY the Motion for Reconsideration of Order Granting New Trial of the Defendant, Volkswagen of America, Inc., having come to the Court's attention that said Motion should be set for hearing; it is, therefore,

ORDERED that the Motion for Reconsideration of Order Granting New Trial of the Defendant, Volkswagen of America, Inc., be and it is hereby Denied

SIGNED FOR ENTRY on this the 23rd day of November, 1999.

Fernando Mancias /S/
DISTRICT JUDGE PRESIDING

CAUSE NO. C-4118-97-B

Bruce S. SPERLING, Elizabeth SPERLING, and Harvey J. BARNETT, as Independent Administrator of THE ESTATE OF HALEY H. SPERLING, deceased,

plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC. and RUDY GARZA,

defendants,

vs.

Andrew RAMIREZ, Ester RAMIREZ, and Andrew Ramirez, Jr. as Next Friend of Jacquelyn Renee GUERRA, a minor, and as Administrator of THE ESTATE OF DIANA ALICE RAMIREZ-GUERRA, deceased,

plaintiff-intervenors

ORDER

On this date came on for consideration defendant Volkswagen of America, Inc.'s Motion for Reconsideration of Order Granting New Trial. The Court, upon consideration, hereby DENIES such motion.

SIGNED this 1st day of Dec., 1999.

/S /

FERNANDO MANCIAS,
JUDGE PRESIDING

CAUSE NO. C-4118-97-B

Bruce S. SPERLING, Elizabeth SPERLING, and Harvey J. BARNETT, as Independent Administrator of THE ESTATE OF HALEY H. SPERLING, deceased,

plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., and Rudy GARZA,

defendants,

v.

ANDREW RAMIREZ; ESTER RAMIREZ, and Andrew RAMIREZ, Jr., as Next Friend of Jacquelyn Renee GUERRA, a minor, and as Administrator of THE ESTATE OF DIANA RAMIREZ-GUERRA, deceased,

plaintiff-intervenors.

93RD JUDICIAL DISTRICT COURT
HIDALGO COUNTY, TEXAS

FINAL JUDGMENT

CAME ON THIS THE ___ day of ___, 1999 Volkswagen of America, Inc.'s Motion to Enter Final Judgment on the Verdict and the Court, after having reviewed the Motion, is of the opinion that the same has merit and finds as follows:

CAME ON TO BE HEARD, on the 14th day of June, 1999, the above-entitled and numbered cause and Plaintiffs Bruce S. Sperling and Elizabeth Sperling, Individually and Harvey J. Barnett, as Independent Administrator of The Estate of Haley H. Sperling and Plaintiff-Intervenors, Andrew Ramirez, Ester Ramirez and Andrew Ramirez, Jr., as next friend of Jacquelyn Renee Guerra, a minor, and as Administrator of The Estate of Diana Ramirez-Guerra, and Co-Defendant/Plaintiff, Rudy Garza, appeared in person and by attorney of record and announced ready for trial. Defendant Volkswagen of America, Inc. appeared in person and by attorney of record and announced ready for trial. No other Defendants remained in the case: Volkswagen AG, mistakenly named as Volkswagen Aktiengelsellschaft, was non-suited prior to commencement of the trial. North Shore Nissan Ltd. d/b/a North Shore Nissan-Volkswagen was non-suited prior to commencement of the trial. Volkswagen Transport GmbH & Co. OHG was dismissed with prejudice prior to commencement of the trial. Commercial Carriers, Inc. settled with Plaintiffs, Plaintiff/Intervenors and Co-Defendant/Plaintiff prior to commencement of the trial, and such case was severed prior to entry of this Final Judgment. Plaintiff-Intervenors' claim against Plaintiffs was settled prior to commencement of the trial, and such case was severed prior to entry of this Final Judgment. Plaintiffs' claim against Co-Defendant/Plaintiff, Rudy Garza was dismissed prior to commencement of the trial. Co-Defendant/Plaintiff, Rudy Garza's claim against Plaintiffs was dismissed prior to commencement of the trial. A jury consisting of twelve qualified jurors was duly impaneled and the case proceeded to trial.

At the conclusion of the evidence and prior to the case being submitted to the jury, the Court granted in part and denied in part Volkswagen of America, Inc.'s Motion for Directed Verdict. The Court then submitted all remaining questions of fact in the case to the jury. The Charge of the

Court and the verdict of the jury are incorporated herein for all purposes attached as Exhibit "A" to this Judgment. On the 9th day of July, 1999, the jury returned a unanimous verdict in favor of Volkswagen of America, Inc. and Defendant Volkswagen of America, Inc. moved for judgment on the verdict. The Court, having considered the motion of Volkswagen of America, Inc., finds that judgment should be rendered on the verdict as follows:

Judgment should be rendered in favor of Defendant Volkswagen of America, Inc. and against Plaintiffs, Plaintiff-Intervenors and Co-Defendant/Plaintiff as to all claims against Volkswagen of America, Inc. Judgment should be rendered in favor of Co-Defendant/Plaintiff and against Plaintiff/Intervenors.

Said Judgment should assess court costs against Plaintiffs, Plaintiff-Intervenors and Co-Defendant/Plaintiff.

IT IS, THEREFORE, ORDERED that the Motion of Volkswagen of America, Inc. for Final Judgment on the Verdict is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

Plaintiffs, Plaintiff-Intervenors and Co-Defendant/Plaintiff TAKE NOTHING from Volkswagen of America, Inc.;

Plaintiff/Intervenors TAKES NOTHING from Rudy Garza;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of Court expended or incurred in this cause are adjudged against Plaintiffs, Plaintiff-Intervenors and Co-Defendant/Plaintiff.

All other relief not expressly granted in this Judgment is DENIED.

SIGNED this 20th day of August, 1999.

Fernando Mancias /S /
JUDGE PRESIDING

APPENDIX D

IN THE SUPREME COURT OF TEXAS
No. 99-0734

In re Bayerische Motoren Werke, AG, , Relator
On Petition for Writ of Mandamus

Petition for writ of mandamus denied.

Justice Hecht, joined by Justice Owen, dissenting from the denial of the motion for rehearing of the petition for mandamus.

If after a three-week trial the court refuses to render judgment on the verdict and instead orders a new trial on its own initiative, is the party who prevailed with the jury entitled to some meaningful explanation, not just that a new trial is "in the interest of justice and fairness"? When a trial court sets aside a jury verdict on its own and compels the parties to suffer the delay and the enormous expense of a retrial — tens, perhaps hundreds, of thousands of dollars — must the court at least say why? Is there any limit to, and any review of, a trial court's power to grant a new trial on its own initiative? The answer to each of these questions, according to our rules of procedure, the constitutional right to a jury trial, this Court's own precedents, and the vast weight of authority from every other American jurisdiction, is yes. By denying the petition for mandamus in this case the Court answers no. I respectfully dissent.

Peggy Marshall lost control of her BMW vehicle and slammed into a light pole, snapping it off at its base. The vehicle caught fire, and Marshall was severely burned while trying to crawl out the driver's side window. She sued the manufacturer of the car, relator Bayerische Motoren Werke,

AG, alleging that the car's fuel system was defectively designed. BMW contended that the fuel system was not defective and that the fire was caused when the bolts in the base of the light pole punctured the car's fuel tank. Marshall claimed that the accident occurred because she swerved to avoid another car, but BMW asserted that Marshall's excessive speed and alcohol consumption caused the accident.

Trial commenced August 3, 1998, and concluded 24 days later with a verdict for BMW. The jury failed to find that BMW's negligence or any design defect in the car caused Marshall's injury and found instead that her injury was caused by her own negligence. Marshall moved for a new trial because the verdict was against the great weight and preponderance of the evidence. Her motion requested a new trial "in the interest of justice and fairness." The district court issued an order stating: "The Court, on its own motion, grants the motion and orders a new trial in the interest of justice and fairness." BMW moved to clarify the order, asking the court to state whether it was granting a new trial on Marshall's motion or on its own initiative, and what grounds it had for ordering a new trial. The court partially granted and partially denied BMW's motion to clarify, stating in its order that Marshall's motion for new trial was denied, that a new trial was granted on the court's own motion, and that the court would not give reasons for granting a new trial. BMW petitioned the court of appeals for mandamus relief, which that court denied without opinion.

Unquestionably, Texas trial courts "have always had broad discretion in the granting of new trials" and may exercise that discretion "'in the interest of justice and fairness.'"[1] As early as 1856 this Court wrote: "In ordinary cases the judge has a discretion to grant a new trial whenever, in his opinion, wrong and injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the

granting of new trials."[2] The Texas Rules of Civil Procedure authorize a trial court to order a new trial, either on motion or on the court's own initiative,[3] in several specific instances: "when the damages are manifestly too small or too large",[4] "because of insufficiency or weight of the evidence",[5] and for jury misconduct.[6] But the rules also authorize a trial court to order a new trial for "good cause",[7] thereby giving the court discretion broad enough to consider reasons not specified in the rules. For example, the court could conclude that error in its trial or pretrial rulings caused the jury to reach erroneous findings, or that the time or manner in which the trial was conducted unfairly prejudiced a party, or that a member of the jury appeared to act in an improper manner — was inattentive, for example — short of misconduct.

Broad as the trial court's discretion is, it is not unbounded. "Good cause" does not mean any cause, nor do the interests of justice and fairness include error, whim, and bias. In granting a new trial, as in other rulings, a trial court can abuse its discretion. For one thing, a court cannot order a new trial for a reason that is simply false. Thus, this Court has indicated that a new trial cannot be granted because of an irreconcilable conflict in a jury's findings when in fact no such conflict exists.[8] Nor can a court grant a new trial conditioned on a party's refusal to accept a remittitur — in essence, grant a new trial because the verdict is not supported by sufficient evidence or is against the great weight of the evidence — if the evidence actually does support the verdict.[9] For another thing, a court cannot order a new trial for an improper reason. It should go without saying that a court cannot order a new trial because it believes the substantive law is wrong and should not be enforced, or because the court is biased for or against plaintiffs or defendants in general, or because it is biased for or against a party or lawyer in the case, or because of invidious discrimination based on race, ethnicity, religion, or gender. A

judge could not, for example, grant a new trial simply because he or she did not like the prevailing party's lawyer.

In Texas, in civil cases, the granting of a new trial cannot be reviewed on appeal, either from the order granting the new trial or from the final judgment.[10] An appeal from the final judgment would not likely be efficacious, since any error in granting the new trial would ordinarily be harmless following a second trial. The Legislature could provide for an interlocutory appeal from an order granting a new trial, and it did so in 1925.[11] But two years later it withdrew the provision, concluding that too many meritless appeals were being taken solely for delay.[12] In 1987 the Legislature provided for an appeal from an order granting a new trial in a criminal case,[13] but no statute or rule provides for such an appeal in a civil case. BMW does not argue to the contrary.

Nevertheless, an order granting a motion for new trial can be reviewed by mandamus, albeit only in extraordinary cases.[14] Our older cases indicate that mandamus will issue to set aside an order granting a motion for new trial only if the order is void,[15] but more recently we have applied the clear-abuse-of-discretion standard[16] generally applicable in mandamus proceedings.[17] We have not applied this standard in proceedings to review the granting of a motion for new trial, but there is no principled reason why the same standard generally applicable to mandamus would not apply. To determine whether a trial court clearly abused its discretion, an appellate court must know the basis for the trial court's ruling. A motion for new trial must clearly state the grounds urged,[18] and an order granting the motion is based on the grounds stated absent some contrary indication. But if a court grants a new trial on its own initiative, the record may be silent on the reasons, and any meaningful review of the order is effectively precluded.

I know of no reason why a trial court's exercise of discretion in granting a new trial should ever be insulated from all review. Marshall argues that there are many possible reasons for granting a new trial, and that is certainly true, but it is no argument for refusing to state whatever ones are applicable. Marshall also suggests that the "interest of justice" has a broad meaning, and that, too, is true, although the idea is not so broad as to have no meaning at all. Indeed, this Court has undertaken to explain why a remand is or is not in the interests of justice,[19] and the same effort could be made for granting new trials.

Rule 59(d) of the Federal Rules of Civil Procedure requires that a court that grants a new trial on its own initiative "shall specify the grounds in its order." As one court has explained, this is "so that the reviewing court can exercise a meaningful degree of scrutiny and safeguard parties''right to a jury trial."[20] No American jurisdictions but Texas and South Carolina[21] allow a trial court broad discretion to grant a new trial on its own initiative without stating a reason.[22] Three states — Arkansas,[23] Nevada,[24] and New York[25] — do not require the trial court to state its reasons but restrict its discretion. Two states — Connecticut[26] and Virginia[27] — do not permit a trial court to grant a new trial on its own initiative at all.

BMW argues that to deprive it of its jury verdict without explanation infringes on its constitutional right to trial by jury. I do not think it is necessary to reach this argument, given our procedural rules, this Court's decisions, and the consensus of American jurisdictions. But given that a trial court cannot refuse a late request for a jury trial without a good reason, as we held in *General Motors Corp. v. Gayle*,[28] I fail to see how a trial court can refuse to render judgment on a jury verdict without a good reason.

I do not quarrel with the broad discretion Texas law has for well over a century given trial courts to grant new trials to achieve justice. But a reasoned explanation for a court's ruling does not curb either the sound exercise of discretion or the cause of justice; rather, it helps guarantee both. There are many reasons why a trial court may grant a new trial. The expectation that at least one reason should be given is not exorbitant. The refusal to give even one is dangerously peremptory.

Nathan L. Hecht
Justice

Opinion delivered: January 27, 2000

1. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *accord Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (per curiam).

2. *Goss v. McClaren*, 17 Tex. 107, 115 (1856).

3. Tex. R. Civ. P. 320. All references to rules are to the Texas Rules of Civil Procedure unless otherwise noted.

4. *Id.*

5. Tex. R. Civ. P. 326.

6. Tex. R. Civ. P. 327.

7. Tex. R. Civ. P. 320, 329.

8. *See Johnson v. Seventh Court of Civil Appeals*, 350 S.W.2d 330, 331 (Tex. 1961).

9. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

10. *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 235-236 (Tex. 1984) (per curiam).

11. Act of Feb. 23, 1925, 39th Leg., R.S., ch. 18, A, 1925 Tex. Gen. Laws 45, codified as Tex. Rev. Civ. Stat. Ann. art. 2249 (Vernon 1925).

12. Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, 1, 1927 Tex. Gen. Laws 75.

13. Act of May 30, 1987, 70th Leg., R.S., ch. 382, 1, 1987 Tex. Gen. Laws 1884, amending Tex. Code Crim. Proc. art. 44.01.

14. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985)

15. *Missouri-Kansas-Texas R.R. v. Brewster*, 78 S.W.2d 575, 576 (Tex. 1934); *Wright v. Swayne*, 140 S.W. 221, 222 (Tex. 1911).

16. *Johnson*, 700 S.W.2d at 918.

17. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

18. Tex. R. Civ. P. 321-322.

19. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992).

20. *Van Steenburgh v. The Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999).

21. See *Sorin Equip. Co. v. The Firm, Inc.*, 474 S.E.2d 819, 822 (S.C. Ct. App. 1996).

22. *Van Steenburgh v. The Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (a district court "must adequately articulate its reasons for overturning a jury verdict... so that the reviewing court can exercise a meaningful degree of scrutiny and safeguard parties' right to a jury trial"); Ala. R. Civ. P. 59(d); Alaska R. Civ. P. 59(e); *McCall v. Coats*, 777 P.2d 655, 657 n.2 (Alaska 1989); Ariz. R. Civ. P. 59(m) ("No order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted."); *Koepnick v. Sears Roebuck & Co.*, 762 P.2d 609, 613 (Ariz. Ct. App. 1988) ("The purpose of Rule 59(m) is to inform the parties and the appellate court of the grounds for the trial court's decision in order to delineate the issues on appeal."); *Thompson v. Friendly Hills Regional Medical Ctr.*, 84 Cal. Rptr.2d 51, 54 (Cal. Ct. App. 1999) ("Trial judges have a 'clear and unmistakable duty' to timely specify their grounds and reasons for granting a new trial."); *Trammell v. McDonnell Douglas Corp.*, 209 Cal. Rptr. 427, 434 (Cal. Ct. App. 1985); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 991-92 (Cal. 1978); *Koch v. Dist. Ct., Jefferson County*, 948 P.2d 4, 7 (Colo. 1997); *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979) ("In this jurisdiction the duty to exercise discretion by a trial judge generally includes the duty to make a record to show what factors the trial judge considered and the reasons for his decision. . . . It is clear that the Trial Judge abused his discretion, at least to the extent of not supplying reasons for the granting of the motion for a new trial."); D.C. R. Civ. P. 59(d); *Ortega v. Perrini & Sons, Inc.*, 371 So.2d 203, 204 (Fla. Dist. Ct. App. 1979) ("[T]he court must specify grounds and give reasons to support the order and refer to facts in the record to make the order susceptible to appellate review."); Ga. Code Ann. 5-5-51 (1999) ("In all civil cases in which a new trial is granted, if the grant of a new trial is based on the

discretion of the judge, the judge shall set forth by written order the reason or reasons for the exercise of his discretion"); Haw. R. Civ. P. 59(d); *Quick v. Crane*, 727 P.2d 1187, 1200 (Idaho 1986) (the trial court "must disclose his reasoning for granting or denying motions for a new trial. . . . Such an articulation of the reasons for the trial court's decision is essential to allow meaningful appellate review."); Ill. Stat. Ann. ch. 725, 5/116-1(c); *DeVittorio v. Werker Bros., Inc.*, 634 N.E.2d 528, 531 (Ind. Ct. App. 1994) ("The court must then state its reasons for granting the new trial by making special findings. . . . [T]he purpose of these requirements is to provide the parties and the reviewing court with the theory of the trial court's decision."); *Hardy v. Britt-Tech Corp.*, 378 N.W.2d 307, 310 (Iowa Ct. App. 1985); Kan. Stat. Ann. 60-259(e); Ky. R. Civ. P. 59.04; *Burris v. Wal-Mart Stores, Inc.*, 652 So.2d 558 (La. Ct. App. 1995), *writ denied*, 654 So.2d 352 (La. 1995) ("[W]e do feel that it is necessary for the trial judge to state an articulable reason or reasons as to why he is exercising his discretionary powers [in granting a new trial]."); Me. R. Civ. P. 59(d); Md. Court R. P. 4-331(e); *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 596 N.E.2d 989, 994 (Mass. 1992) ("[T]he requirement that a judge specify the grounds for a conditional ruling on a motion for new trial is important in order to allow a reviewing court knowingly to rule on the question before it, and to allow the opposing party an opportunity to rectify any deficiencies in its case before retrial."); *Kailimai v. Firestone Tire & Rubber Co.*, 247 N.W.2d 295, 296 (Mich. 1976) ("Whereas granting a new trial does not finally determine the controversy between the parties, it does subject both sides to the additional time and expense of relitigation. In addition, it has the effect of setting aside a jury verdict in favor of one side, a step that should not be taken without sound reasons."); *Vadnais v. American Family Mut. Ins. Co.*, 243 N.W.2d 45, 48 (Minn. 1976) ("the power [to grant new trials] is not . . . an arbitrary one, and must be founded upon reasons similar to those stated"); Miss. R. Civ.

P. 59(d); *Hall v. Missouri Hwy. & Transp. Comm'n*, 861 S.W.2d 720, 721 (Mo. Ct. App. 1993) ("Rule 78.03 requires the trial court to specify the ground or grounds upon which a new trial is granted. . . . [F]ailure to do so creates a presumption of error."); Mont. R. Civ. P. 59(f) ("Any order of the court granting a new trial, shall specify the grounds therefor with sufficient particularity as to apprise the parties and the appellate court of the rationale underlying the ruling . . . ."); *Kumar v. Douglas County.*, 452 N.W.2d 21, 24 (Neb. 1990); *Cotton v. Gering Pub. Sch.*, 511 N.W.2d 549, 553 (Neb. App. 1993); N. J. Sup. Ct. R. Civ. Prac. 4:49-1(c); *Vartenissian v. Food Haulers, Inc.*, 475 A.2d 626, 631 (N J. Super. Ct. App. Div. 1984); *Allsup's Convenience Stores, Inc. v. The N. River Ins. Co.*, 976 P.2d 1, 10 (N.M. 1998) ("[W]here the trial court sets forth certain reasons for which the appellant asserts there is a lack of support in the record, the burden then shifts to the appellee to show that the trial court was correct."); *Chiltoski v. Drum*, 464 S.E.2d 701, 702 (N.C. Ct. App. 1995), *review denied*, 468 S.E.2d 777 (N.C. 1996) ("Otherwise . . . the record will not reveal the basis upon which the order is made or permit intelligent review by an appellate court."); N.D. R. Civ. P. 59(f) ("With all orders granting or refusing a new trial, the judge shall file a written memorandum concisely stating the different grounds on which the ruling is based . . . ."); *Antal v. Olde Worlde Prods., Inc*, 459 N.E.2d 223, 225 (Ohio 1984) ("[M]eaningful appellate review is impossible where the trial court grants a new trial and fails to specify the reasons beyond a conclusory statement."); *Dodson v. Henderson Properties, Inc.*, 708 P.2d 1064, 1065 (Okla. 1985) ("[Decisions to grant new trials are reviewed for] sound legal discretion in accordance with recognized principles of law, rather than an arbitrary discretion exercised at will."); Ore. Rev. Stat. 19.430 (1999) ("If an appeal is taken from an order of the trial court granting a new trial on its own initiative, the order shall be affirmed on appeal only on grounds set forth in the order . . . ."); Pa. R. Civ. P. 227.1(e); *Carlin v. Parkview Serv. Co.*, 625

A.2d 212 (R.I. 1993); S.D. Cod. Laws Ann. 15-6-59(d) (1998); Tenn. R. Civ. P. 59.05; Ut. R. Civ. P. 59(d); Vt. R. Civ. P. 59(d); Wash. Sup. Ct. Civ. R. 59(f); *Simmons v. Koeteeuw*, 489 P.2d 364, 366 (Wash. Ct. App. 1971) ("The trial court also granted the new trial upon the ground substantial justice was not done. No definite reasons of law and fact were set forth in the order as required by CR 59(f)."); W. Va. R. Civ. P. 59(d); *Krolikowski v. Chicago & Northwestern Transp. Co.*, 278 N.W.2d 865, 868 (Wis. 1979) ("The order granting a new trial in the interest of justice must contain the reasons and bases for the general statement contained therein."); Wy. R. Civ. P. 59(d).

23. *See Ray v. Green*, 839 S.W.2d 515, 516 (Ark. 1992) ("While a trial court has some discretion in setting aside a jury verdict, there is no longer the broad discretion that this court formerly recognized. The trial court is not to substitute its view of the evidence for that of the jury's unless the jury verdict is found to be clearly against the preponderance of the evidence.").

24. Nev. R. Civ. P. 59(a); see *Brascia v. Johnson*, 781 P.2d 765, 767 (Nev. 1989) ("[A] court may not substitute its own judgment in place of the jury's judgment unless the jury erred as a matter of law.").

25. *See Nicastro v. Park*, 495 N.Y.S.2d 184, 188 (N.Y. App. Div. 1985) ("[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict.").

26. Conn. Gen. Stat. 52-228(b) (1999).

27. Va. Code Ann. 16.1-97.1 (1998).

28. 951 S.W.2d 469, 476-477 (Tex. 1997).

APPENDIX E

Jurisdictions in Which a Trial Court's Decision to Grant a New Trial Is Subject to Appellate Review for Abuse of Discretion

Federal	*Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365-366 (3rd Cir. 1999); *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 1201 (11th Cir. 1993); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir.1997).
Alabama	*Floyd v. Broughton*, 664 So.2d 897, 899-900 (Ala. 1995).
Alaska	*Trobough v. French*, 803 P.2d 384, 385 (Alaska 1990).
Arizona	*Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 860 P.2d 1328, 1331 (Ariz. Ct. App. 1993).
Arkansas	*Burnett v. Fowler*, 869 S.W.2d 694, 698 (Ark. 1994).
California	*County of San Diego v. Bressi*, 229 Cal Rptr. 44, 47 (Ct. App. 1986).
Colorado	*Southeastern Colorado Water Conservancy Dist. v. O'Neill*, 817 P.2d 500, 506 (Colo. 1991).
Connecticut	*Wochek v. Foley*, 477 A.2d 1015, 1018 (Conn. 1984).
Delaware	*Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).
District of Columbia	*Durphy v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.*, 698 A.2d 459, 468 (D.C. 1997)

Florida	*Mauro v. Deer Park Spring Water, Inc.*, 667 So.2d 416 (Fla. Dist. Ct. App. 1996).
Georgia	*Central of Georgia R.R. Co. v. Hearn*, 372 S.E.2d 834, 837 (Ga. Ct. App. 1988).
Hawaii	*Aga v. Hundahl*, 891 P.2d 1022, 1029 (Haw. 1995).
Idaho	*Lanham v. Idaho Power Co.*, 943 P.2d 912, 923-924 (Idaho 1997).
Illinois	*Marotta v. General Motors Corp.*, 483 N.E.2d 503, 506-507 (Ill. 1985).
Indiana	*Kirchoff* v. *Selby*, 703 N.E.2d 644, 648 (Ind. 1998).
Iowa	*Hardy* v. *Britt-Tech Corp.*, 378 N.W.2d 307, 310 (Iowa Ct. App. 1985).
Kansas	*Cott v. Peppermint Twist Management Co.*, 856 P.2d 906, 913 (Kan. 1993).
Kentucky	*Pratt v. Mountain Utils. Co.*, 594 S.W.2d 881, 883 (Ky. 1980).
Louisiana	*Thibodeaux v. Burton*, 538 So.2d 1001, 1005 (La. 1989).
Maine	*Rodriguez v. Tomes*, 610 A.2d 262, 265 (Me. 1992).
Maryland	*Argyrou v. State of Maryland*, 709 A.2d 1194, 1200 (Md. 1998).
Massachusetts	*In re Wyatt*, 701 N.E.2d 337, 346 (Mass. 1998).
Michigan	*Vargo v. Denison*, 364 N.W.2d 376, 377 (Mich. Ct. App. 1985).
Minnesota	*Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984).

Mississippi	*FlightLine, Inc. v. Tanksley,* 608 So.2d 1149, 1161 (Miss. 1992).
Missouri	*Carnell v. Dairyman's Supply Co.,* 421 S.W.2d 775, 776 (Mo. 1967); *Simpkins v. Ryder Freight Sys., Inc.,* 909 S.W.2d 683, 685 (Mo. Ct. App. 1995).
Montana	*Sandman v. Farmers Ins. Exch.,* 969 P.2d 277, 287 (Mont. 1998).
Nebraska	*Wolfe v. Abraham,* 506 N.W.2d 692, 694 (Neb. 1993).
Nevada	*Hale v. Riverboat Casino, Inc.,* 682 P.2d 190, 193-194 (Nev. 1984).
New Hampshire	*Walton v. City of Manchester,* 666 A.2d 978, 980 (N.H. 1995).
New Jersey	*Kaplan v. Haines,* 232 A.2d 840, 848 (N.J. Super Ct. App. Div. 1967), *affd,* 241 A.2d 235 (N.J. 1968).
New Mexico	*Rhein v. ADTAutomotive, Inc.,* 930 P.2d 783, 788 (N.M. 1996).
New York	*Pena v. New York City Transit Auth.,* 587 N.Y.S.2d 331, 332 (App. Div. 1992).
North Carolina	*In re Will of Buck,* 516 S.E.2d 858, 861 (N.C. 1999).
North Dakota	*Perry v. Reinke,* 570 N.W.2d 224, 230 (N.D. 1997).
Ohio	*Osler v. City of Lorain,* 504 N.E.2d 19, 24 (Ohio 1986).
Oklahoma	*Clark v. Bearden,* 903 P.2d 309, 312 (Okla. 1995).
Oregon	*Bradley v. Gudeman,* 543 P.2d 1045, 1047 (Or. 1975).

Pennsylvania	*Morrison v. Pennsylvania,* 646 A.2d 565, 570 (Pa. 1994).
Rhode Island	*Rambone v. Town of Foster,* 741 A.2d 283, 284 (R.I. 1999).
South Carolina	*Bailey v. Peacock,* 455 S.E.2d 690, 691 (S.C. 1995).
South Dakota	*Kjerstad v. Ravellette Publications Inc.,* 517 N.W.2d 419, 426 (S.D. 1994).
Tennessee	*Campbell v. Archer*, 555 S.W.2d 110, 112-113 (Tenn. 1977).
Utah	*Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991).
Vermont	*Lockwood v. Lord,* 657 A.2d 555, 559 (Vt. 1994).
Virginia	*Reel v. Ramirez,* 416 S.E.2d 226, 228 (Va. 1992).
Washington	*Ayers v. Johnson & Johnson Baby Prods. Co.* , 818 P.2d 1337, 1348 (Wash. 1991).
West Virginia	*Gum* v. *Dudley*, 505 S.E.2d 391, 396 (W. Va. 1997).
Wisconsin	*Giese v. Montgomery Ward, Inc.,* 331 N.W.2d 585, 593 (Wis. 1983).
Wyoming	*Vaughn v. Wyoming,* 962 P.2d 149, 151 (Wyo. 1998).

APPENDIX F

States That Permit Immediate Review Of Orders Granting A New Trial

Alabama	ALA. CODE § 12-22-10 (1999).
Arizona	ARIZ. REV. STAT. ANN. § 12-2101(K)(1) (1999).
Arkansas	Ark. R. App. P. 2(a)(3) (Lexis 1999).
California	CAL. CIV. PROC. CODE § 904.1(a)(4) (Lexis 1999).
Florida	FLA. STAT. ANN. § 59.04 (Lexis 1999).
Idaho	Idaho App. R. 11(5) (Lexis 1999).
Indiana	IND. CODE ANN. § 34-56-1-3 (Burns 1998).
Iowa	Iowa R. App. P. 1 (a) (West 2000).
Minnesota*	Minn. R. App. P. 103.03(d)(g), 105.01 (West 1993 & 1999 Supp.).
Missouri	MO. ANN. STAT. § 512.020 (Vernon 1999).
Montana	Mont. R. App. P. I(b)(2) (1999)
Nebraska	NEB. REV. STAT. § 25-1315.03 (1999).
Nevada	Nev. R. App. P. 3A(b)(2).
New Hampshire	*Hodgdon* v. *Beatrice D. Weeks Mem. Hosp.*, 515 A.2d 1199, 1200 (N. H. 1986).
New York*	N.Y. Civ. Prac. L. & R. 5701(a)(2)(iii) (McKinney's 2000).
North Carolina	N.C. GEN. STAT. § 7A-27(d)(4) (1999).
North Dakota	N.D. CENT. CODE § 28-27-02(4) (1999).

Ohio	OHIO REV CODE ANN. § 2505.02(B)(3) (Baldwin's 2000).
Oklahoma	OKLA. STAT. ANN. tit. 12, § 952(b)(2) (2000).
Oregon	OR. REV. STAT. § 19.205(2)(d) (1999).
Pennsylvania	Pa. R. App. P. 311(a)(6) (Purdon's 2000).
South Carolina	S.C. CODE ANN. § 14-3-330(2)(b) (1999).
South Dakota	S.D. CODIFIED LAWS ANN. § 15-26A-3(3) (2000).
Washington	Wash. R. App. P. 2.2(a)(9) (1998-1999).
West Virginia	W. VA. CODE § 58-5-1 (1999).
Wyoming	Wyo. R. App. P. 1.05(d), 59 (Lexis 1999).

*Limits class of new-trial orders that are immediately appealable.

APPENDIX G

States That Permit Appeal Of New Trial Orders Following Judgment In Second Trial

Alaska	*Trobough v. French,* 803 P.2d 384, 385 n. 1 (Alaska 1990).
Colorado	Colo. R. Civ. P. 59(h) (West 2000).
Cormecticut	CONN. GEN. STAT. ANN. § 52-263 (2000); *Solomon* v. *Keiser*, 562 A.2d 524, 526 (Conn. 1989).
Delaware	DEL. CODE ANN. tit. 109, §§ 144, 145 (1999); Del. Sup. Ct. R. 42(b)(iii), (iv) (1999).
District of Columbia	D.C. CODE ANN. § 11-721 (1995)
Georgia*	Ga. Court Rules & Procedures §§ 5-5-50, 5-6-33(a)(1), 5-6-34(b), 9-11-54(b) (1999).
Hawaii*	Haw. Rev. Stat. § 641-1(b) (1985 & Supp. 1993); Haw. R. Civ. P. 54(b); *Harkins v. Ikeda*, 557 P.2d 788, 790 (Haw. 1976).
Illinois*	Ill. Sup. Ct. R. 301, 306(a)(1) (1999); *Hall v. Chicago & N. W. Ry. Co.*, 125 N.E.2d 77, 83-84 (Ill. 1955); *Robbins v. Professional Constr. Co.*, 380 N.E.2d 786, 788-789 (Ill. 1978).
Kansas*	KAN. CIV. PROC. CODE ANN. § 60-2102(b) (Vernon 1999); *In re Acquisition of Property by Eminent Domain*, 690 P.2d 1375 (Kan. 1984).
Kentucky	KY. REV. STAT. ANN. 22A.020 (Michie 1998); Ky. R. Civ. P. 59.01 (1999)
Louisiana*	LA. CODE CIV. PROC. ANN. art. 2083(A) (Supp. 1999); *Wright v. O'Neal,* 414 So.2d

	880 (La. Ct. App. 1982), aff'd in relevant part, 427 So.2d 852, 853 (La. 1983).
Maine	*Town of Eliot v. Burton,* 392 A.2d 56, 58-59 n.2 (Me. 1978).
Maryland	*Buck v. Cam's Broadloom Rugs, Inc.*, 612 A.2d 1294, 1297 (Md. 1992).
Massachusetts	Mass. R. Civ. P. 59 (West 1999); *Brooksbank* v. *Epstein*, 363 N.E.2d 291, 292 (Mass. Ct. App. Ct. 1977).
Michigan*	Mich. R. App. P. 7.203 (1999); *Willett v. Ford Motor Co.*, 253 N.W.2d 11 1, 113 (Mich. 1977); *Denha v. Jacob,* 446 N.W.2d 303 (Mich. Ct. App. 1989).
Mississippi*	Miss. Sup. Ct. R. 5(a)(1); *Harrison v. Illinois Cent. R.R.*, 69 So.2d 218, 221-22 (Miss. 1954).
New Jersey	N.J.R. App. P. 2:2-1 to -5 (West Group 2000).
New Mexico	*Martinez v. Ponderosa Prods., Inc.*, 772 P.2d 1308 (N.M. Ct. App. 1988)
Tennessee*	Tenn. R. App. P. 3(a), 9(a)(2), 10; *Panzer* v. *King*, 743 S.W.2d 612, 614-615 (Tenn. 1988).
Vermont*	*Costa* v. *Volkswagen of Am.*, 551 A.2d 1196 (Vt. 1988), *overruled on other grounds, Gochey v. Bombardier, Inc.*, 572 A.2d 921 (Vt. 1990).
Virginia	VA. CODE § 8.01-670(A)(3) (1999); *Reel v. Ramirez,* 416 S.E.2d 226 (Va. 1992).
Wisconsin	Wis. Stat. Ann. 808.03(l),(2)(a), 809.50(l) (West 1994 & Supp. 1999); *Giese v. Montgomery Ward, Inc.*, 331 N.W.2d 585 (Wis. 1983).

*Also permits immediate appeal at discretion of appellate court.